

ORIGINAL

DOCKET FILE COPY ORIGINAL
RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

MM Docket 92-266

To: The Commission

MOTION FOR LEAVE TO FILE
SUPPLEMENT TO PETITION FOR RECONSIDERATION

ValueVision International, Inc. ("ValueVision")
respectfully requests leave to file the accompanying Supplement
to Petition for Reconsideration in order to document its recent
experience in seeking leased access, following the release of the
Commission's leased commercial access rules in the Report and
Order issued in this docket. 8 FCC Rcd 5631 (1993) ("Report").
ValueVision was unable to include this information in its
petition for reconsideration of the Report or its subsequent
pleadings,^{1/} because the responses to its requests for leased
access were not received until after the pleading cycle had

^{1/} See Petition for Reconsideration of ValueVision
International, Inc., MM Docket No. 92-266 (filed June 21, 1993);
Opposition to Petitions for Reconsideration of ValueVision
International, Inc., MM Docket No. 92-266 (filed July 21, 1993);
and Reply to Oppositions to Petition for Reconsideration of
ValueVision International, Inc., MM Docket No. 92-266 (filed
August 2, 1993).

No. of Copies rec'd
List ABCDE

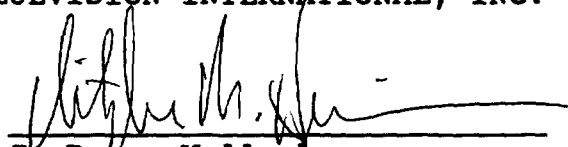
expired. Grant of this request would serve the public interest by providing the Commission with information concerning the substantial difficulties experienced by cable programmers under the leased access rules currently in effect.

For the foregoing reasons, ValueVision requests the Commission to grant leave to file the accompanying Supplement to Petition for Reconsideration.

Respectfully submitted,

VALUEVISION INTERNATIONAL, INC.

By



J. Roger Wollenberg
William R. Richardson, Jr.
Christopher M. Heimann

Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Its Attorneys

November 23, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

NOV 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

Rate Regulation)

MM Docket 92-266

To: The Commission

SUPPLEMENT TO PETITION FOR RECONSIDERATION

ValueVision International, Inc. ("ValueVision") respectfully files this supplement to its pending petition for reconsideration, in order to document its experience in seeking leased access following the release of the Commission's leased access rules in the Report and Order issued in this docket in May 1993. 8 FCC Rcd 5631 (1993).

In its petition, ValueVision contended that the implicit fee model adopted by the Commission would authorize cable operators to demand exorbitant leased access rates that would prevent competitive programmers like ValueVision from obtaining leased access. Petition at 9-10. ValueVision's subsequent experience demonstrates that its concerns were well founded. Indeed, this experience appears to mirror quite closely

the Commission's recent concerns about potential evasions of the other rate regulation provisions of the Cable Act.^{1/}

Following the release of the Commission's leased access regulations, ValueVision wrote to the largest 99 MSOs around the country both requesting leased access carriage, and seeking information on leased access rates, terms and conditions.^{2/} Although the new rules have been in effect for almost three months now, close to 70 of these operators have failed to respond in any way to ValueVision's requests -- contrary to the requirement of Section 76.970 of the Commission's rules that cable operators "[u]pon request, [provide] a schedule of commercial leased access rates . . . to prospective leased access programmers." 47 C.F.R. § 76.970. Seven of the remaining operators have asked ValueVision to provide substantial additional information or to complete lengthy forms without even providing rate schedules.^{3/} One has demanded a non-refundable

^{1/} See Separate Statement of Chairman James H. Quello, Letters of Inquiry - Cable Rates (November 17, 1993) (expressing concern that "the practices that are the subject of our investigation reflect a propensity by cable operators to push the limits of our rules -- perhaps in some instances appropriately, perhaps in others inappropriately").

^{2/} Attached is a copy of the request for rate information included with each of ValueVision's requests for leased access.

^{3/} The information demanded by cable operators includes information about ValueVision's capital structure (i.e., information about classes of stock, par value of stock, votes per share, shares authorized and issued, et cetera), prior litigation, ValueVision's carriage on other cable systems, its production experience, and information (which ValueVision has already disclosed in its requests) about the type of programming ValueVision intends to provide.

fee before it will provide information about leased access rates. Another has refused to provide rates until it is certain that its understanding of maximum permissible leased access rates is consistent with ValueVision's interpretation of the Commission's rules. And another has gone so far as to state -- over six months after release of the rules and over two months after they became effective -- that it has neither the time nor the inclination to comply with ValueVision's request.

As ValueVision predicted in its petition, a number of those few operators that have actually provided leased access rate information have proposed exorbitant rates six hundred percent (600%) to eleven hundred percent (1100%) times those previously negotiated by ValueVision before the new rules -- in some cases with their own affiliated systems! Prior to the adoption of the implicit fee model, for example, ValueVision had negotiated leased access agreements with a number of TCI cable systems and others at rates averaging \$.08/sub/month (based on 24 hour carriage, 7 days per week). Following the release of the leased access rules, TCI has pulled ValueVision from four of those systems representing 393,800 subscribers, and has demanded far greater rates for leased access on several other systems. TCI has, for example, demanded \$.52/sub/month for the lease of a channel on a full-time basis on its Vacaville, CA system (or \$127,732.80 annually), \$.90/sub/month for its Boise, Idaho system (or \$458,298.00 annually), and \$.82/sub/month for its Oakland, NJ system (or \$1,843,693.25 annually). Other cable operators and

MSOs have demanded similarly exorbitant rates. For example, Cox Cable Bakersfield has demanded \$.58/sub/month, or \$153,120.00 annually) for carriage on its Bakersfield, CA system. Others have sought rates as high as \$1.86/sub/month.

TCI's attempts to evade or subvert the objectives of rate regulation provisions of the 1992 Cable Act are amply demonstrated by an internal TCI memorandum, which has recently become the object of Commission scrutiny.^{4/} In that memorandum, a TCI official states that TCI must "take . . . revenue from the sources [it] can, when [it] can," and estimates that TCI can, by charging for services that had previously been offered at low rates or free of charge, "recover almost half of what [it is] losing from rate adjustments." Mr. Marshall goes on to state that TCI "cannot be dissuaded [sic] from the charges simply because customers object," because "they'll get used to it." (Emphasis in original.) He concludes that "[t]he best news of all is, we can blame [the rate increases] on reregulation and the government now. Let's take advantage of it!" The exorbitant rates demanded by TCI and others for leased access is, quite simply, another example of attempts to "take advantage of" loopholes or unforeseen consequences of Commission regulations to eviscerate congressional objectives.

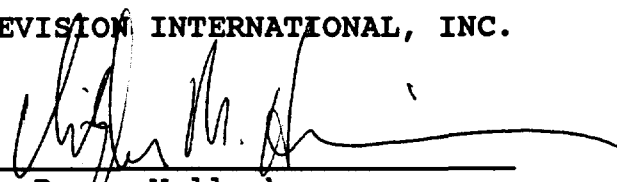
^{4/} See November 16, 1993, Letter of Inquiry to John C. Malone, President and Chief Executive Officer of TCI, concerning the August 20, 1993, Memorandum of Barry Marshall to System Managers, State Managers, and Division Vice Presidents (attached hereto).

In short, the implicit fee construct adopted by the Commission has permitted cable operators to demand rates for leased access that have had the effect of squelching rather than encouraging the development of alternative cable programming services, contrary to the clear objectives of the Commission in implementing the congressional mandate. Just as the Commission has refused to accept such conduct in the context of basic cable rate regulation, it should refuse to permit it here. For the reasons stated above and in ValueVision's petition for reconsideration, the Commission should implement "changes in [its] rules to ensure that the intent of Congress in enacting the 1992 Cable Act . . . is preserved."^{5/}

Respectfully submitted,

VALUEVISION INTERNATIONAL, INC.

By


J. Roger Wollenberg
William R. Richardson, Jr.
Christopher M. Heimann

Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Its Attorneys

November 23, 1993

^{5/} Separate Statement of Chairman James H. Quello, Letters of Inquiry - Cable Rates (November 17, 1993).



ValueVision International, Inc. 5194 West 76th Street Minneapolis, MN 55439 (612) 831-1407 Fax (612) 831-4870
DENVER OFFICE: 1905 Sherman Street Denver, CO 80203 (303) 860-1899 Fax (303) 860-1599

NOTICE OF APPLICATION
FOR LEASED ACCESS CARRIAGE

May 4, 1993

ATTENTION: GENERAL MANAGER

Dear GM:

We are writing to notify you of VALUEVISION INTERNATIONAL'S interest in providing its programming to your subscribers in conformity with the provisions of all applicable laws and regulations related to leased access.

Specifically, based on our understanding that the law and FCC regulations obligate cable operators to make a certain percentage of channel space available for leased access purposes, please consider this letter a formal request to purchase leased access time, up to one full-time, 24 hour per day, 7 day per week channel, for one full year on your cable system or for such a longer term as the law permits.

As a matter of process, and in order to initiate the VALUEVISION launch, we would appreciate a quote for our purchase of that time. We will then reply to the quote that you provide. This request for carriage is subject to both the terms of the Cable Act and to approval of the leasing charges and/or costs by VALUEVISION. We will be happy to furnish you with any additional information necessary to process our request.

Please contact us at your earliest convenience so that we can help you meet the FCC's June 21, 1993 deadline with respect to the effective date of these regulations. We have already contacted your corporate office, with whom you may wish to coordinate these activities. Thank you for your consideration. I hope that we can find a way to do substantial business together.

Sincerely,

A handwritten signature in dark ink, appearing to read "Stephen Cunningham", is written over the typed name.

Stephen Cunningham
Senior Vice President,
Program Distribution,
VALUEVISION INTERNATIONAL, INC.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

November 16, 1993

IN REPLY REFER TO:

LOI-93-20

John C. Malone
President and Chief Executive Officer
Tele-Communications, Inc.
Terrace Tower II
5619 DTC Parkway
Englewood, Colorado 80111-3000

Dear Mr. Malone:

This is a letter of inquiry concerning the attached memorandum received by this office dated August 20, 1993 from Barry Marshall of Telecommunications, Inc., Englewood, Colorado, to System Managers, State Managers, and Division Vice Presidents.

Section 623 of the Cable Act of 1992 authorizes the Commission to establish regulations governing rates for regulated cable services. Section 76.922 of the Commission's rules establishes the requirements for determining permitted programming service charges. Section 76.923 of the Commission's rules establishes the requirements for determining the charges, based on actual costs, for equipment and installation services, including, but not limited to, charges for lease and installation of converter boxes, remote control units, connections for additional receivers, and other cable home wiring. FCC Form 393, in turn, prescribes in detail the instructions for determining programming service and equipment charges as of the initial date of regulation pursuant to those rule sections. That form prescribes the methodology for the comparison of rates to the benchmark as of the initial date of regulation and the development of permitted initial per channel rates across all tiers. In particular, equipment revenues are combined with programming service rates for purposes of developing an average per channel rate across all tiers that is then compared to the benchmark. Equipment and installation revenues based on rates developed in accordance with Section 76.923 of the rules are subtracted from average per channel rates for purposes of developing final programming service charges. Section 623(h) of the Cable Act of 1992 directs the Commission to prevent evasions of rate regulation.

TCI is directed to demonstrate that any new equipment and installation charges referenced in Mr. Marshall's memorandum, and any related programming service charges, comply with the Commission's rules and the instructions contained in FCC Form 393. In particular, TCI is directed to provide a detailed description of the methodology used to develop charges for the

services indicated in the memorandum.

TCI also is directed to provide, for a representative system, a general description, with supporting documentation, of the development by TCI of regulated equipment, installation, and programming service charges. In this regard, TCI is required to submit a completed FCC Form 393 for the services provided by the representative system. TCI is directed to provide this information for this representative system with respect to rates in effect both before and after rate and service restructurings intended to comply with rate regulations that became effective September 1, 1993.

TCI is directed to provide a list of the systems, with community unit identification numbers, that were, or could have been, subject to the rate-setting procedures described in the above-referenced memorandum.

The foregoing information will enable this office to determine whether a further investigation, or enforcement action, should be initiated concerning development by TCI of regulated equipment and/or service charges. This information may additionally be shared with local franchising authorities. TCI is directed to provide this information within thirty days of the date of this letter.

Sincerely,



Roy J. Stewart
Chief, Mass Media Bureau

TELEPHONE TOWER II
10000 E. 10th Avenue
Englewood, CO 80111-3000

Post Office Box 5630
Denver, Colorado 80217-0630
(303) 267-4400

~~TELEPHONE~~ TELE-COMMUNICATIONS, INC.

MEMORANDUM

TO: System Managers
State Managers
Division Vice Presidents

FROM: Barry Marshall *[Signature]*

CC: Art Lee
Madonna Guenther
Sharan Wilson

DATE: August 20, 1993

RE: NEW TRANSACTION CHARGES

As we move into the regulatory environment, it's important to remember something vital... under regulation, we can't simply adjust our economics anymore. We have to take the revenue from the sources that we can, when we can. To that end, I want to remind each of you that the transaction charges for upgrades, downgrades, customer caused service calls, VCR hookups, etc. are vital new revenue sources to us. We estimate that by charging for these functions, we can recover almost half of what we're losing from rate adjustments.

We have to have discipline. Such like the install fee problem, we cannot be dissuaded from the charges simply because customers object. It will take awhile, but they'll get used to it....they pay it to other service providers all the time.....and it isn't free with the phone company!

Please hang in on this and installs, and we can still have a great fourth quarter when we have our heaviest volume. The best news of all is, we can blame it on reregulation and the government now. Let's take advantage of it!

bpm/sa

CERTIFICATE OF SERVICE

I, Christopher M. Heimann, hereby certify that on this 23rd day of November, 1993, I have caused copies of the foregoing "Motion for Leave to File Supplement to Petition for Reconsideration" and "Supplement to Petition for Reconsideration" to be served by hand or first class mail, postage prepaid, to the following:

- * Chairman James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
- * Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
- * Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
- * Maureen A. O'Connell
Legal Advisor to Chairman Quello
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
- * Byron F. Marchant
Legal Advisor to Commissioner Barrett
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
- * John C. Hollar
Legal Advisor to Commissioner Duggan
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

* Alexandra M. Wilson
Chief, Cable Services Division
Mass Media Bureau
Federal Communications Commission
2033 M Street, N.W.
Washington, D.C. 20554

* Bruce A. Romano
Cable Services Division
Mass Media Bureau
Federal Communications Division
2033 M Street, N.W.
Washington, D.C. 20554

* Karen A. Kosar
Policy and Rules
Federal Communications Commission
2025 M Street, N.W.
Room 8202
Washington, D.C. 20554

Brenda L. Fox
Peter F. Feinberg
J.G. Harrington
Peter C. Godwin
Dow, Lohnes & Albertson
Attorneys for Cablevision Industries Corporation
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

J. Bruce Irving
Bailey, Hunt, Jones & Busto
Attorneys for Sur Corporation
Courvoisier Centre, Suite 300
501 Brickell Key Drive
Miami, FL 33131-2623

Paul Glist
James F. Ireland
Robert G. Scott, Jr.
Cole, Raywid & Braverman
Attorneys for Continental Cablevision, Inc.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

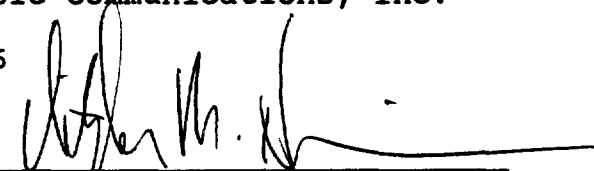
Sharon Webber
Angela J. Campbell
Citizens Communications Center
Institute for Public Representation
Georgetown University Law Center
Attorneys for Center for Media Education
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Philip L. Verveer
Sue D. Blumenfeld
Laurence D. Atlas
Wilkie, Farr & Gallagher
Attorneys for Time Warner Company, L.P.
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036

John R. Feore, Jr.
David J. Wittenstein
Michael J. Pierce
Dow, Lohnes & Albertson
Attorneys for Home Shopping Network, Inc.
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

Robert J. Sachs
Howard B. Homonoff
Continental Cablevision, Inc.
The Pilot House
Lewis Wharf
Boston, Massachusetts 02110

John I. Davis
Donna C. Gregg
Michael Baker
Wiley, Rein & Fielding
Attorneys for Bend Cable Communications, Inc.
1776 K Street, N.W.
Washington, D.C. 20006



Christopher M. Heimann

*

By Hand